(8)

No. 85-1384

In The
Supreme Court of the United States
October Term, 1986

WILLIAM R. TURNER; CATHY CROCKER; EARL ENGELBRECHT; BETTY BOWEN; BERNICE E. TRICKEY; HOWARD WILKINS; JANE PURKETT; WILLIAM F. YEAGER; LARRY TRICKEY, Employees of the Department of Corrections and Human Resources for the State of Missouri,

Petitioners,

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people,

Respondents.

DR. LEE ROY BLACK; W. DAVID BLACKWELL; DONALD WYRICK; BETTY BOWEN; EARL ENGELBRECHT, Employees of the Department of Corrections and Human Rescurces for the State of Missouri,

Petitioners,

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

NOTICE OF MOTION FOR LEAVE TO FILE AND BRIEF AMICI CURIAE OF PRISONERS' LEGAL SERVICES OF NEW YORK, INC., PRISON FAMILIES OF NEW YORK, JEROME N. FRANK LEGAL SERVICES ORGANIZATION (CONNECTICUT), AND CITIZENS UNITED FOR REHABILITATION OF ERRANTS (WASHINGTON, D.C.)

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Petitioners,

v.

LEONARD SAFLEY, et al.,
Respondents.

NOTICE OF MOTION OF PRISONERS' LEGAL SERVICES ET AL. FOR LEAVE TO FILE AN AMICI BRIEF

PERSONS:

PLEASE TAKE NOTICE that upon the annexed affidavit of ROBERT SELCOV, Prisoners' Legal Services of New York, and other proposed *amici curiae* move this Court for leave to file a Brief *Amici Curiae* pursuant to Supreme Court Rule 36.3.

Dated: September 8, 1986

Yours, etc.,

ROBERT SELCOV*
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Supreme Court of the United States

October Term, 1986

—o—

WILLIAM R. TURNER, et al.,
Petitioners,
v.
LEONARD SAFLEY, et al.,
Respondents.

AFFIDAVIT IN SUPPORT OF MOTION
No. 85-1384

—o—

STATE OF NEW YORK)
COUNTY OF DUTCHESS) ss:

ROBERT SELCOV swears that:

1. I make these statements in support of the motion of proposed *Amicus,* Prisoners' Legal Services of New York, for leave to file a brief *Amici Curiae* in this case, to be co-sponsored by Prison Families of New York, the Jerome N. Frank Legal Services Organization, and Citizens United for Rehabilitation of Errants. A full statement of the interest of proposed *amici* is appended to the Brief (Appendix A thereto).

2. Attorneys for the respondent have consented to the filing of this *Amici Curiae* brief. Attorneys for petitioners have refused their consent. (Appendix A to this affidavit).

3. Prisoners' Legal Services of New York is interested in this cas because it currently represents prison-

ers who have been denied the right to marry and has also represented prisoners who wished to correspond with other prisoners. These two issues are directly raised in this case.

4. I believe the Brief deals squarely with the following issues which were not fully addressed by the parties below and have not been addressed in briefs provided to this Court to date:

a) Since defendants-petitioners (defendants) have conceded that marriage is a fundamental right for prisoners, the parties have not directly addressed the issues posed by this Court's summary affirmance in *Butler v. Wilson,* 415 U.S. 953 (1974) (affirming without opinion a three judge district court decision denying that prisoners have a fundamental right to marry). *Amici* have fully discussed the import of *Butler* and its relationship to subsequent decisions of this Court.

b) *Amici* provide an alternative analysis of Supreme Court precedent to support the idea that heightened scrutiny should apply to the prison administrative policies at issue.

c) *Amici* provide the Court with the scientific and sociological literature concerning the rehabilitative advantage of allowing prisoner marriages, which directly refutes defendants' contention that marriage is harmful.

d) *Amici* provide the Court an analysis of cases demonstrating the need for strict judicial review of prison administrative action impinging First Amendment rights.

5. Prisoners' Legal Services has had many years of experience as a prisoners' legal advocacy organization.

I believe that this experience and perspective differ from that of the parties and I hope it will be of use to the Court.

6. For these reasons, the motion by Prisoners' Legal Services, et al. to file a brief *amici curiae* should be granted.

ROBERT SELCOV
DAN GETMAN
DAVID C. LEVEN
Prisoners' Legal Services
of New York
2 Catharine Street
Poughkeepsie, New York 12601

Sworn to before me this
day of September, 1986.

Notary Public

APPENDIX A

(Seal)

ATTORNEY GENERAL OF MISSOURI
Jefferson City
65102

William L. Webster
Attorney General

P.O. Box 899
(314) 751-3321

August 27, 1986

Mr. Dan Getman
Staff Attorney
Prisoners Legal Service of New York
2 Catherine Street
Poughkeepsie, NY 12601

Re: Turner et al. v. Safley et al.,
Supreme Court No. 85-1384

Dear Mr. Getman:

I have received your request to file an amicus curiae brief in Turner v. Safley in support of plaintiff/appellees. I have consulted with my client and I am sorry to say that we will not agree to have you file an amicus brief in this case.

I am sorry. If I can be of any further assistance to you, please do not hesitate to contact me at 314-751-8788.

Sincerely,

WILLIAM L. WEBSTER
Attorney General

/s/ Henry T. Herschel
Assistant Attorney General

HTH:ds

cc: Service List

APPENDIX A, p. 2

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August 26, 1986

Mr. Dan Gettman
Staff Attorney
Prisoners' Legal Services of New York
Two Catharine Street
Poughkeepsie, New York 12603

Re: *Turner v. Safley*
No.: 85-1384
Our File: 5132

Dear Mr. Gettman:

This is to inform you that the Respondents in the above-referenced case hereby consent to the filing of an *amicus curiae* brief by the Prisoners' Legal Services of New York and the additional sponsors.

Very truly yours,

/s/ Floyd R. Finch, Jr.
Cecelia G. Baty

FRF, Jr./rmg

cc: William L. Webster
Henry T. Herschel

No. 85-1384

In The

Supreme Court of the United States

October Term, 1986

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WILLIAM R. TURNER; CATHY CROCKER; EARL ENGELBRECHT; BETTY BOWEN; BERNICE E. TRICKEY; HOWARD WILKINS; JANE PURKETT; WILLIAM F. YEAGER; LARRY TRICKEY, Employees of the Department of Corrections and Human Resources for the State of Missouri,

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INTEREST OF AMICI CURIAE

This brief is filed on behalf of Prisoners' Legal Services of New York, Inc., Prison Families of New York, Jerome N. Frank Legal Services Organization (Connecticut), and Citizens United for Rehabilitation of Errants (Washington, D.C.) upon motion as provided by Supreme Court Rule 36.3.

Each of the organizations listed above are committed to protecting the rights of the incarcerated women and men throughout the United States. *Amici* share the deep conviction that prisoners should be permitted to avail themselves of the sacred right of marriage and should be able to correspond with each other when doing so is not a threat to penological goals. A full description and statement of interest of each *amicus* is set forth at the back of this brief as Appendix A.

o

SUMMARY OF ARGUMENT

This Court has declared that marriage is a fundamental right "for all individuals." In this case the defendants concede that marriage is a fundamental right for prisoners too. Many other courts, though, have relied on this Court's summary affirmance in *Butler v. Wilson* for the proposition that prisoners do not have a fundamental right to marry. Although *Butler* has been implicitly overruled by a later decision of this Court, to clarify the ambiguity created by *Butler, amici* argue that *Butler* should be explicitly overruled.

Since marriage is fundamental for prisoners, courts must apply heightened scrutiny to any restriction significantly limiting its exercise. Under heightened scrutiny, defendants' policy and practice are flagrantly unconstitutional.

Defendants' primary justification for restricting prisoner marriages is to protect women prisoners from making mistakes in their love-lives. The District Court below termed this purpose "excessively paternalistic." All penological literature points to the key role marriage plays in the rehabilitation of prisoners and their success on parole.

The severe restrictions that defendants have placed on prisoners' ability to correspond with other prisoners must be evaluated under a standard that closely scrutinizes the justifications for the policy. For two confined individuals, written correspondence represents their only lawful means of communication. Prior decisions of this Court do not require that review of such a core First Amendment freedom be limited to determining whether it rationally advances any state interest.

The Circuit Courts of Appeals have continued to subject prison regulations that impinge upon First Amendment rights to meaningful judicial review. Many cases demonstrate that prison officials can present minimally rational justifications for limiting prisoners' rights, but that there would be no burden on institutional objectives if their policies were amended to accommodate those rights. Thus, a more demanding standard of review must be used to evaluate regulations that infringe on prisoners' constitutional rights, especially those protected by the explicit terms of the First Amendment.

ARGUMENT

POINT I

PRISONERS HAVE A FUNDAMENTAL RIGHT TO MARRY.

In *Zablocki v. Redhail,* 434 U.S. 374, 384 (1978), this Court declared that marriage was a fundamental right for all individuals. Defendants in this case concede that prisoners too have a fundamental right to marry. *Amici* agree. *Amici* urge this Court to find that *Butler v. Wilson,* 415 U.S. 953 (1974) is inconsistent with *Zablocki* and therefore should be overruled.

In *Butler v. Wilson,* this Court summarily affirmed the judgment of a three judge district court which held that life-term prisoners in New York had no fundamental right to marry. *Johnson v. Rockefeller,* 365 F. Supp. 377 (S.D.N.Y. 1973). The District Court reasoned that lifers in New York could not cohabit, have sexual intercourse, or beget children with their intended spouses and so marriage was a mere formal ceremony.*

This overly restrictive view of the interest prisoners have in marriage has been severely criticized. *See Lockert v. Faulkner,* 574 F. Supp. 606 (D.In. 1983) ("Marriage is

---

* The opportunity to cohabit, have intercourse, and raise children is often not foreclosed in prison. As of 1982, seven states permitted conjugal visitation for prisoners. *See* Ann Goetting, "Conjugal Association in Prison: A World View" 14 *Criminal Justice Abstracts* 406 (September 1982). The majority of states make furloughs available to prisoners, *see* Carson Markley "Furlough Programs and Conjugal Visiting in Adult Correctional Institutions" 37 *Federal Probation* 19 (March 1973) (29 correctional departments in 1973). Many imprisoned parents maintain direct and active parental roles through visitation and correspondence as well.

infinitely more than the sharing of a single roof and bed. . ." at 609) "[T]he non-tangible devotion of [husband] and wife is certainly of equal—many would say higher—value. By barring . . . marriage, the state deprives [the prisoner] and his wife-to-be of the critical emotional support to be found in the formalized and symbolic relationship itself. The State prevents them from committing themselves to each other." *Johnson v. Rockefeller* 365 F. Supp. 377, 382 (S.D.N.Y. 1973) (Lasker, concurrence and dissent). The Court below noted that *Johnson* "ignores the elements of emotional support and public acknowledgement and committment which are central to the marital relationship." *Safley v. Turner,* 777 F.2d 1307, 1314 (8th Cir. 1985). Prisoners also may wish to marry to legitimate children. *See* Finding of Fact, No. 20 by the District Court below, *Safley v. Turner,* 586 F. Supp. 589, 592 (D.Mo. 1984).

This Court has repeatedly downplayed the significance of summary affirmances. "[S]ummary actions do not have the same authority in this Court as do decisions rendered after plenary consideration." *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 500 (1981). *See also Edelman v. Jordan,* 415 U.S. 651 (1974). "Summary actions . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Mandel v. Bradley,* 432 U.S. 173, 176 (1977). "They do not present the same justification for declining to reconsider a prior decision as do decisions rendered after argument and with full opinion." *Metromedia, Inc., supra.* "It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary

action." *Washington v. Yakima Indian Nation,* 439 U.S. 463, 477, n.20 (1979). This is particularly true when subsequent plenary decisions of the Court undercut a prior summary decision.

Four years after the summary affirmance in *Butler,* in *Zablocki v. Redhail, supra,* this Court implicitly overruled *Butler* and held that "the right to marry is of fundamental importance *for all individuals.*" 434 U.S. at 384 (emphasis added). While previous decisions had indicated that marriage was considered fundamental, *Loving v. Virginia,* 388 U.S. 1 (1967); *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942), the holding in *Zablocki* was the first that applied fundamental rights analysis to a governmental restriction of the right to marry. The Court, in finding marriage fundamental, relied upon features of the marital relationship additional to those called lacking in Johnson.*

In *Zablocki,* this Court held that the due process right of privacy and equal protection clause invalidated a Wisconsin statute that required previously married persons under support obligations to obtain court permission in order to remarry. The Court held that:

> When a statutory classification significantly interferes with the exercise of a fundamental right, it can-

---

* Marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress. . . . It is an association that promotes a way of life, not causes, a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." (cites omitted) *Zablocki, supra,* 434 U.S. at 384.

> not be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.

434 U.S. at 388. Since marriage is fundamental, governmental restrictions on marriage are subjected to strict scrutiny.

Since *Zablocki,* the federal and state courts have generally, but not uniformly held that prisoners have a fundamental right to marry. For courts that have held marriage to be fundamental for prisoners, see *Bradbury v. Wainwright,* 718 F.2d 1538 (11th Cir. 1983); *Lockert v. Faulkner,* 574 F. Supp. 606 (D.In. 1983); *Salisbury v. List,* 501 F.Supp. 105 (D.Nev. 1980); *In re Carrafa,* 77 Cal. App. 3d 788, 143 Cal. Rptr. 848 (1978). Other courts have continued to rely on the summary affirmance of *Johnson v. Rockefeller, supra. See e.g. Hudson v. Rhodes,* 579 F.2d 46 (6th Cir. 1978) (per curiam) *cert. den.* 440 U.S. 919 (1979); *Wool v. Hogan,* 505 F. Supp. 928 (D.Vt. 1981); *Holden v. Dept. of Corrections,* 400 So. 2d 142 (Ct. App. Fla. 1981).

Although the defendants in this case concede that marriage is a fundamental right for prisoners (Petitioners' Brief, p. 30, para. 3) and do not rely on *Johnson,* this Court's implicit overruling of *Johnson* in *Zablocki* should be made explicit. *Zablocki v. Redhail, supra,* established the framework for analysis of a governmental restraint upon the fundamental right to marry. The District Court's decision in *Johnson v. Rockefeller* is inconsistent with *Zablocki* and should be overruled.

POINT II

HEIGHTENED SCRUTINY SHOULD BE GIVEN TO DEFENDANTS' RESTRICTION OF A PRISONER'S RIGHT TO MARRY.

Since defendants concede that prisoners have a fundamental right to marry, the next step in the Court's analysis must be to determine what level of judicial review to apply to restriction of that right. Defendants argue that although marriage is fundamental for prisoners, this Court should apply only a "rational relation" review (Petitioners' Brief, p.31). Defendants apparently claim that heightened scrutiny should never be applied to prison regulations. While this Court has never specifically decided what level of review to apply to a restriction of a prisoner's fundamental right, logic and past precedent urge that heightened scrutiny should apply. This Court has never subjected a restriction of a fundamental right to mere rationality review.

Defendants cite three Supreme Court cases for the proposition that lax scrutiny should apply to review prisoners' right to marry: *Jones v. North Carolina Prisoners' Union,* 433 U.S. 119 (1979); *Bell v. Wolfish,* 441 U.S. 520 (1979) and *Block v. Rutherford,* 468 U.S. 576 (1984). While relaxed scrutiny was applied in those particular cases, they do not stand for the proposition defendants assert, that heightened scrutiny should never apply to prison regulations.

In *Jones v. North Carolina Prisoners' Union,* this Court upheld a prison restriction on a prisoners' union's group meetings and inmate to inmate organizational solicitations, applying "rationality review". But the Court

chose this low level of review noting that "[t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration." 433 U.S. at 125. In other words, the nature of imprisonment must entail restrictions on certain rights. *Jones* held that prisoners' concerted group activities were *necessarily* incompatible with incarceration, 433 U.S. at 125-6, and so restrictions on prisoners' efforts to unionize were subjected only to rational relation review.

While a prisoners' labor union necessarily threatens institutional security, a prisoner's marital union does not. Marriage is not inconsistent with the fact of incarceration. Many prisoners are married when they enter prison and remain married through their term of imprisonment. Some of the typical prerogatives of the marital relationship may be limited by the mere fact of incarceration or only available to a lesser degree (e.g. cohabitation, conjugal visitation), but the marriage itself is not inherently inconsistent with incarceration.*

---

* Permitting prisoners to marry does not require that prisons make the opportunity for conjugal visitation available. *See* Note "Prison Inmate Marriages: A Survey and a Proposal" 12 *U. Rich L. Rev.* 443 (Winter 1978) "It is uniformly held that consummation through sexual intercourse or cohabitation is not a requirement of a valid marriage ceremony." at 449. *See* numerous cases cited therein. Furthermore, the fact of marriage does not entitle the prisoner to any other additional rights. *See In re Carrafa, supra,* where the court struck down a Department of Corrections action prohibiting a marriage between an inmate and outsider. The court noted that marriage and visitation were quite distinct and that the Department was free to prohibit visitation completely, if appropriate, but could not prohibit the marriage.

Nor do *Bell v. Wolfish* and *Block v. Rutherford* stand for the proposition that lax review is required for all prison regulations. In *Bell,* this Court held that the constitution does not preclude double-bunking of pre-trial detainees. The Court noted:

> "We do not doubt that the Due Process Clause protects a detainee from certain conditions and restrictions of pretrial detainment . . . Nonetheless, that Clause provides no basis for application of a compelling-necessity standard to conditions of pretrial confinement that are not alleged to infringe any other, more specific guarantee of the Constitution . . . And to the extent the court relied on the detainee's desire to be free from discomfort, it suffices to say that this desire simply does not rise to the level of those fundamental liberty interests delineated in cases such as *Roe v. Wade,* 410 U.S. 113 (1973); *Eisenstadt v. Baird,* 405 U.S. 438 (1972) [right to dispense contraceptives]; *Stanley v. Illinois,* 405 U.S. 645 (1972) [paternity interest of unwed fathers]; *Griswold v. Connecticut,* 381 U.S. 479 (1965) [fundamental privacy right to use of contraceptives]; *Meyer v. Nebraska,* 262 U.S. 390 (1923). (parallel cites omitted).

441 U.S. at 533-5. While the Court found no reason to apply a "compelling necessity" standard in a case where no specific constitutional guarantee was infringed, the Court implied that such a standard *should* apply in a case, such as the one at bar, where a recognized fundamental right is infringed.

Block v. Rutherford, 468 U.S. 576 (1984) goes no farther than *Bell v. Wolfish.* Where no specific constitutional right exists prison regulations are subjected only to rational relation review. 468 U.S. at —, 82 L.Ed.2d at 445-6. Furthermore, the standard of review applied by

the court in *Rutherford,* and upon which defendants rely, is the test to determine whether a condition of confinement constitutes illegal punishment of pretrial detainees in the absence of a demonstrable intent to punish. 82 L.Ed.2d at 445. The court indicated no intent to apply the same standard of review in the wholly different context of restriction of fundamental rights.

In *Zablocki v. Redhail, supra,* the Court held that when a governmental regulation "significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." 434 U.S. at 388. No decision of this Court has held that when a governmental regulation restricts a prisoner's rights it automatically is given relaxed scrutiny.

In *Procunier v. Martinez,* 416 U.S. 396 (1974), this Court gave heightened scrutiny to restrictions on prisoner correspondence, noting:

> a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.

416 U.S. at 405-6. This Court has never subjected restrictions on fundamental rights to mere rationality review as the defendants urge here.

The more logical approach would be to recognize that prisoners too may have fundamental rights which when unaffected by the simple fact of their incarceration may only

be restricted by regulation narrowly tailored to a sufficiently compelling state interest. There is no doubt that the state's interests in prison security and prisoner rehabilitation are strong interests.* And these interests in some circumstances may well be sufficiently important to outweigh the individual interest asserted. *See Lee v. Washington,* 390 U.S. 333, 334 (1968) (concurring opinion). Heightened scrutiny by this Court does not undermine the state's interest, but rather recognizes the powerful competing interests and gives the strict attention to detail that the proper balance between weighty interests deserves. The importance of the state's interest may in particular cases outweigh the competing individual interest, but it should not in and of itself change the standard of review.

POINT III

DEFENDANTS' INTEREST IN RESTRICTING PRISONER MARRIAGES DOES NOT OUTWEIGH PRISONERS' FUNDAMENTAL RIGHTS.

> "It is in protecting women inmates from 'gigolos' that Superintendent Turner hopes to better prepare them to function in the outside world. . . . As one of the defendants' experts testified, women inmates suffer from different types of problems compared to male inmates. Those different problems have contributed to the women inmates' criminal behavior. Too often they were overly dependent on males."

(Petitioners' Brief, pp. 34-5). The defendants' justification in this case is not merely absurd. It is offensive. The District Court found defendant Turner's attitude "exces-

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* Prisoners share these interests as well. See Point III, *infra,* for the notion that prisoner marriages advance the mutual interests of security and rehabilitation.

sively paternalistic'' 586 F. Supp. at 597. The paternalistic justification offered by defendants for their restriction of prisoners' rights to marry should not be countenanced by this Court. *See Frontiero v. Richardson,* 411 U.S. 677 (1973) and *Orr v. Orr,* 440 U.S. 268 (1979). The defendants' willingness to assert this gender discriminatory justification demonstrates anew the need for judicial review of prison administrative action. Under any level of review, this state interest cannot support restricting prisoners' right to marry.

Defendants' assertion that the regulation is justifiable in order to protect women prisoners from making mistakes in their love-lives is the only justification they have spelled out in detail. Defendants' tentative security justification is apparently supported by the hodge-podge of individual anecdotes—the analysis of which can only buttress the conclusion that ''defendants have no right to have the last word on a personal decision of this import.'' *Safley,* 586 F. Supp. at 594-5.

The defendants express concern over ''lovers' quarrels'' (Petitioners' Brief, p.36) and ''love triangles'' (Petitioners' Brief, p.39). These same complications will exist regardless of whether a prisoner is able to marry. While defendants must be implying that the ability to marry could further exacerbate these problems, they do not support this contention with evidence in the record. It seems more plausible that the opposite would result. The ability to marry might help ameliorate such quarrels.

Defendants' contention that rehabilitation demands that prisoner marriage be restricted is not only counter-intuitive, and based on paternalistic notions of the needs

of women prisoners, but it is belied by all social science data available. As discussed below, the literature on prison rehabilitation is full of praise for inmate marriages. There appears to be absolutely no support for the notion that restricting inmate marriages is beneficial. In a field noted for intractible disagreement, the uniformity of opinion on the positive effect of marriage is astounding.

There have been four empirical studies confirming the importance of marriage for an inmate's parole release success (the best and perhaps most important indicator of rehabilitation).* The first study was conducted by Lloyd Ohlin.** Ohlin found that while married inmates averaged only 3 or 4 visits per year from parents, friends and other relatives, they averaged 24 visits per year from their wives. Furthermore, ''. . . eighty percent of those who had lived in common-law relationships were not getting visits from their 'wives'.'' Building on these data Ohlin found that:

> 75% of the inmates classified as maintaining 'active family interest' while in prison were successful on parole while only 34% of those considered loners experienced parole success. . . . The value to society of maintaining strong prisoner-family relationships can be seen in all categorical measures. In every comparison category, including those with 3 or more prior commitments, men with more family-social ties have had the fewest parole failures.

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* Each of the studies cited below concerned male prisoners. *Amici* have not been able to find any studies concerning female prisoners.

** Ohlin, L. "The Stability and Validity of Parole Experience Tables." Ph.D. dissertation, University of Chicago, 1954, as reported in Homer "Inmate-Family Ties: Desirable but Difficult" 43 *Federal Probation* 47, 49 (March 1979).

Furthermore, active family interest proved to be the single best success predictor.

> Even the most highly regarded parole success indicators were not found to affect parole success as much as *having a family to go home to*. . . . Even 'having a job waiting' did not affect parole success as much as regular visits. [Emphasis added]

Similar findings were reported by Norman Holt and Donald Miller in their study "Explorations in Inmate-Family Relationships." They found a significant difference in the recidivism rate of prisoners who have had regular, continuing visits from family members.*

Burstein in his study *Conjugal Visits in Prison,* a study of 40 inmates in the Soledad Training Facility, also found a positive correlation between family involvement during incarceration and success on parole.** More recently, Daniel Glaser has noted, "[m]en whose first residence is with their wives have the fewest [parole] failures, and those living alone have the most." *The Effectiveness of a Prison and Parole System,* abr. ed. (Indianapolis: Bobbs-Merrill Co., 1969) at p. 249. These studies are

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* As reported in "Inmate-Family Ties: Desirable but Difficult" f.n. p. 13, *infra*.

** As reported in Goetting, Ann "Conjugal Association in Prison: Issues and Perspectives" 28 *Crime and Delinquency* 52 (Jan. 1982).

echoed time and again in less empirical works.* There are no dissenting voices.

There appear to be many reasons for the better performance of married convicts upon release, including the availability of community ties fostering stability in the inmate's personal life, the feeling of being needed by others leading to a sense of personal obligation, and the emotional support and assistance to help the inmate withstand the pressures of incarceration and transition following release. Ohlin notes that for the released married inmate:

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* Martin and Webster, *Social Consequence of Conviction* (London: Heinemann, 1971) note that: "It seems likely that the maintenance of a marital family is the most important single factor in helping a man to stay out of trouble on release, and therefore any practice that would encourage this would be desirable," at 89. The authors also point out that "the more deeply he is involved with wife, family and friends . . . the lower his chances of reconviction are likely to be." at 211. Benedict Alper states, "Many prisoners have no families, are not married, are 'lone sticks.' We cannot expect the prison to make up for such lack in a man's life. But if we dealt adequately with all those men who started out with good family situations, and helped to maintain them to the best of our ability, we would go far to prevent the recurrence of criminal careers." *Prisons Inside-Out: Alternatives in Correctional Reform* (Cambridge, Mass.: Ballinger Publ. Co., 1974). *See* Homer "Inmate-Family Ties: Desirable but Difficult" 43 *Federal Probation* 47, 49 (March 1979): "The convergence of these studies, the consensus of findings, should be emphasized. The strong positive relationship between strength of family social bonds and parole success has held up for more than fifty years, across very diverse offender populations and in different locales. It is doubtful if there is any other research finding in the field of corrections which can come close to this record." *See also* Hardwick "Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation" 60 *N.Y.U.L. Rev.* 275 (1985). "It is difficult to understand however, how the state interest in rehabilitating prisoners could be furthered by a ban on prisoner marriages." Note "Standard of Review in Prisoners' Rights Litigation and the Constitutional Right to Marry." 12 *U.S.F.L. Rev.* 465 (Spring 1978).

> His adjustment is made easier because he finds a clearly defined place for himself and a conventional role to play. The effect is to direct his activity along conventional lines and to offset feelings of being rejected, different, or set apart—as though he, an ex-convict, were on one side of an impassable barrier and the conventional person on the other. These beneficial effects are greatest in instances where the family has maintained an active interest and given much-needed support and encouragement to the offender during his imprisonment.

Selection for Parole: A Manual of Parole Prediction (New York: Russell Sage Foundation, 1951) p.49.

The defendants' justification for restricting prisoner marriages cannot withstand heightened scrutiny. The judgment of the Eighth Circuit Court of Appeals should be affirmed.

POINT IV

THE REGULATION LIMITING INMATE CORRESPONDENCE SHOULD BE SUBJECT TO HEIGHTENED SCRUTINY.

Amici urge this Court to closely scrutinize the necessity for the restrictions defendants have placed on inter-inmate correspondence. *Amici* will not address the application of this standard to the facts of this case, as they believe that plaintiffs' counsel is better situated to fully present the relevant facts to the Court.

In *Procunier v. Martinez,* 416 U.S. 396 (1974), this Court reviewed rules governing the censorship of prisoner correspondence. The Court evaluated these regulations under a standard of review that demanded close and meaningful scrutiny of the prison officials' asserted rationale for

the rules. It held that a restriction on correspondence must further one or more of the substantial governmental interests of security, order and rehabilitation and must be no more than is necessary or essential to protect that interest. The scrutiny required by *Martinez* should be applied in reviewing defendants' inmate-to-inmate correspondence rule.

Defendants argue that *Martinez* is not controlling because the Court based its decision on the rights of the prisoners' correspondents and not those of the prisoners themselves. However, the Court approached the issue in this manner so that it would not be necessary "to consider the extent to which an individual's right to free speech survives incarceration . . . " *Id.* at 408. The Court had not yet considered whether prisoners could claim any protection under the First Amendment, and it found it unnecessary to decide the question in *Martinez. Cf. Hudson v. Palmer,* 468 U.S. 519 (1984) (prisoners do not have any Fourth Amendment rights with respect to their prison cell).

Subsequent cases have held that prison regulations impinging on First Amendment freedoms of prisoners are subject to judicial review. *See Pell v. Procunier,* 419 U.S. 817 (1974); *Jones v. North Carolina Prisoners' Union,* 433 U.S. 119 (1977); *Bell v. Wolfish,* 441 U.S. 520 (1979). Contrary to defendants' assertion, these cases do not require that only a minimal standard of review be used in this case.

Pell recognized that a prisoner retains those First Amendment rights that are not inconsistent with his status or with the legitimate penological objectives of the correctional system. The Court upheld a ban on face-to-face

interviews between professional journalists and individual inmates, relying on the fact that alternative means of communication were permitted.

Three years later, in *Jones,* the Court reviewed three limitations on prisoners' First Amendment rights. They were: (1) a ban on bulk mailing; (2) a prohibition on inmate-to-inmate solicitation of membership in a labor union; and (3) a ban on all meetings of the union. Initially the Court noted that First Amendment speech rights were barely implicated by any of the restrictions under review. The advantages to the prisoners of bulk mailing were stated as cheaper rates and convenience, which do not fundamentally implicate *free speech* values. Also, the ban on bulk mailing did not extend to individual mailings, so there was not a total prohibition on communication of information about the union. The second regulation was found to be both reasonable and necessary in light of the fact that the prison officials were authorized to control organized union activity. Additionally, solicitation involved more than the simple expression of individual views; rather, it was advocation of legitimately prohibited activity and, therefore, could be restricted. Finally, the associational rights implicated in the prohibition on group meetings were found to be necessarily limited by the realities of confinement.

First Amendment rights of prisoners were once again considered in *Bell,* which involved a "publishers only" rule for inmates' receipt of hardbound books. As in *Jones,* the Court relied on the fact that the increased cost necessitated by the rule did not fundamentally implicate free speech values.

In these decisions, the Court did not limit *Martinez* as defendants argue. Significantly, in *Pell* the Court distinguished *Martinez* on the ground that no legitimate governmental interest to justify the correspondence restrictions had been found, while security concerns were obviously implicated by visitation. *Martinez* was not explained away by the *Pell* court as having relied on the rights of free persons. This approach is the more appropriate one to use in assessing the import of *Martinez.* The Court stated in *Martinez* that the legitimate needs of the institutions, particularly the need to maintain internal security, could, in some circumstances, justify a restrictive correspondence regulation. The Court also stated that prison officials must be allowed some latitude in anticipating the consequences of allowing certain speech in the prison environment. This analysis is similar to that later used in cases where inmates' rights were directly confronted. When deciding the constitutionality of prison regulations, the determining factors should be related to the legitimate needs of the prison system, and not whether the plaintiff is a prisoner or free person.

This is especially true in the context of the First Amendment speech values. Freedom of speech is a preferred freedom, one of the most highly valued in our society. *See Palko v. Connecticut,* 302 U.S. 319, 326-327 (1937). A rule limiting such a fundamental right should not be permitted to stand when it is clear from the record that the rule is overbroad or of limited value, even if it does appear to be rationally related to some state interest.

In light of the preferred nature of First Amendment rights, the federal courts have been understandably reluctant to abdicate their role as protector of the constitution

and to allow a rule of deference to effectively become one of no meaningful review. In addition to the Eighth Circuit's decision in this case, both the Second and Third Circuits have recently given stricter scrutiny to prison regulations that curtail fundamental First Amendment freedoms.

The Second Circuit addressed this question in *Abdul Wali v. Coughlin,* 754 F.2d 1015 (2d Cir. 1985). The case involved a ban on inmates' receipt of a report written by Prisoners' Legal Services concerning conditions at the Attica Correctional Facility. The prison authorities argued that a security problem would be created if inmates read this report, primarily because the authorities believed that the report was not accurate. The administration took issue with allegations of racism and brutality on the part of prison guards. It censored this report in spite of the fact that similar reports had been previously permitted into the prisons. Also, the report had been widely covered in the press, and these articles had been allowed into the prisons.

The Second Circuit undertook an extensive analysis of this Court's precedents. The court concluded that it was appropriate to closely evaluate the legitimacy of the state's asserted justification for its action. In doing this, the court specifically relied on the facts that the intended speech was being totally censored, without any alternatives being permitted and that a prisoner's reading of a report about prison conditions was not inconsistent with his status as a prisoner. The court also noted that logic did not compel the conclusion that inmates' reading of the report would create security problems in the prisons.

The Third Circuit discussed the issue in *Shabazz v. O'Lone,* 782 F.2d 416 (3d Cir. 1986) (*en banc*), *cert. filed,*

which considered the constitutionality of a prison regulation that prohibited minimum security Muslim inmates from attending weekly religious services held at noon on Fridays. The prison authorities justified their policy on the grounds that overcrowding necessitated that minimum security prisoners be assigned to work assignments outside the prison and that security demands militated against allowing prisoners to return to the facility during the day because of the burden of accounting for and supervising inmates.

In *Shabazz,* the court overruled in part its previous decision of *St. Claire v. Cuyler,* 634 F.2d 109 (3d Cir. 1980), because the court found that the standard of review used in *St. Claire* gave inadequate protection to prisoners' free exercise rights. It criticized the prior standard because it did not require the state to establish that its security concerns were genuine and were based upon more than speculation. Also, *St. Claire* had not required that there be an accommodation between institutional objectives, including those related to security, and the rights of prisoners. The court remanded the case so that the challenged policy could be evaluated under a more demanding standard of review. The state was required to prove that the challenged regulations were intended to serve and do serve the important penological goal of security, and that no reasonable method exists by which the prisoners' religious rights can be accommodated without creating bona fide security problems.

The Circuit Courts have correctly held that this Court's precedents do not require federal courts to blindly defer to prison officials' views of their security needs. It would be an unimaginative prison administration or state's attorney that could not think of some credible security ra-

tionale for almost any prison regulation. Thus, the Seventh Circuit has written, "We do not read anything in *Wolfish* as requiring this court to grant automatic deference to ritual incantations by prison officials that their actions foster the goals of order and discipline." *Lock v. Jenkins,* 641 F.2d 488, 498 (7th Cir. 1981). Similarly, the Sixth Circuit wrote in *Weaver v. Jago,* 675 F.2d 116, 119 (6th Cir. 1982), "The state must do more than simply offer conclusory statements that a limitation on religious freedom is required for security, health or safety in order to establish that its interests are of the 'highest order' ".

Prisoners' Legal Services' experience in New York demonstrates that courts must not abandon their duty to enforce the constitutional rights of prisoners and that a more exacting standard of review must be required. Several cases have been litigated in New York over the past several years where prison officials have asserted security and other rationales for limiting inmates' rights where it is clear either that accommodation could have been made or that the justifications were extremely speculative or specious.

Among these cases is *Matter of Rivera v. Smith,* 63 N.Y.2d 501 (1984), where a Muslim prisoner challenged a rule that required him to be pat frisked by a correction officer of the opposite sex, an action which violated his religious beliefs. The prison authorities argued that their rule was justified by the security needs of the facility and their obligation to preserve female officers' equal employment opportunities. The security need that was asserted was the avoidance of delay required to respond to a Muslim's objection. The Court invalidated the rule as applied, under the state's constitution and statutes. It found that

the prisoners' rights should be accommodated under the circumstances. The specific pat frisk being challenged occurred in a non-emergency situation, and there were male officers present who could have conducted the search. Other prisoners were being frisked at the same time, and the female officer could have searched them. Clearly, the Muslim's religious freedom could be preserved without compromising either of the state's interests, and the court properly invalidated the authorities' overstated and unthinking justifications.

Several cases have been filed in both federal and state courts in New York challenging a rule that prohibits demonstrative prayer in outside yards. These cases have been brought by Muslim inmates who are required by their religion to perform salat five times each day, at designated times based on the sun's position in the sky. If required to pray in their cells during the short days of winter they totally lose the opportunity to participate in outdoor activity. Prison officials have argued that some inmates may be antagonized simply by observing Muslim inmates praying. Additionally, they justify their policy as a way to minimize inmate conflict, which they claim may occur if one inmate's recreation activity interrupts another's prayer.

Decisions in two of these cases have been reported. In *Matter of Abdullah v. Smith,* 115 Misc. 2d 105 (Sup. Ct. Wyoming Co. 1982), *affd.,* 96 A.D.2d 742 (4th Dept. 1983), the lower court ordered that Muslim inmates at Attica Correctional Facility either be permitted to pray in the yard or be allowed access to another area to pray and then be admitted to the yard. By the time the appeal was heard, a new policy had been adopted in conformance with the

judgment. The court found that there had not been any interference with the prison's security and order as a result of the new policy, and therefore it affirmed the judgment.

The second reported case on this issue, *Aziz v. LeFevre,* 642 F.2d 1109 (2d Cir. 1981), was filed by Muslims at Clinton Correctional Facility. The Second Circuit reversed the District Court's granting of summary judgment for the defendants and remanded the case. In doing so, it stated its view that only the slightest accommodation to the prisoners' needs was necessary to resolve the dispute and that it was difficult to understand how no other arrangement could meet the asserted security need. The correctness of this view was demonstrated one year later at Attica, as a result of the *Abdullah* decision, when an alternative policy was implemented with no adverse consequences. Also, since the remand in *Aziz,* the no prayer rule has not been enforced in the yard at Clinton, and inmates have been praying there without any adverse consequences.*

It is interesting to note the history of New York's Department of Correctional Services' policy on the prayer issue. In the early 1960's, when Muslim groups were seek-

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* Prisoners' Legal Services of New York is counsel for the plaintiffs in *Aziz.*

Another case has been filed on this issue: *Majid, et al. v. Henderson, et al.,* 75 Civ. 341 (N.D.N.Y.), a case out of Auburn Correctional Facility. Prisoners' Legal Services is also counsel in this case. *Majid* was recently settled. The prison officials agreed to allow prayer in an area near the yard, which could be used without requiring that all yard time be forfeited. They also offered to allow prayer in one designated portion of the yard, but the inmates chose the other option.

ing to receive formal status as religions, the prisoners argued that they were forced to hold all religious services in the prison yard. The prison's Acting Warden replied that the inmates were not forced to hold services in the yard, that those who did so acted voluntarily and were not interfered with by prison officials. *See Matter of Brown v. McGinnis,* 10 N.Y.2d 531 (1962). The complete turnaround in official policy twenty years later is remarkable. It also highlights the fact that no evidence of actual disruption in the yard as a result of prayer was presented in the recent cases, although prayer was admittedly permitted in the past. This surely proves that the speculative security concerns asserted by the prison administration should not be accepted by the courts as grounds for limiting prisoners' free exercise rights.

A case from New York challenging correspondence rules also demonstrates *Amici's* point. In *Milburn v. McNiff,* 108 A.D.2d 860 (2d Dept. 1985), a rule requiring that mail to the media be submitted unsealed was challenged. All personal correspondence other than business mail and all privileged correspondence could be sealed by the prisoners. The prison authorities argued that media mail could be used to circumvent other correspondence regulations if it was allowed to be submitted sealed. The court found this rationale to be completely unpersuasive, because it could not accept that a prisoner would use mail addressed to the media for such a purpose instead of his personal correspondence.

One final case from New York clearly shows the need for a stricter test than mere rationality when fundamental First Amendment rights are implicated. In *Matter of*

Shahid v. Coughlin, 83 A.D.2d 8 (3d Dept. 1981), *affd.*, 56 N.Y.2d 987 (1982), Muslim prisoners challenged a rule that prohibited them from using any covering when they were forced to use communal showers. This rule required that they violate their religious principles, which require strict modesty. By the time the case was decided, the rule had been changed to allow them to cover themselves with a clean towel. In spite of this simple solution, which accommodated both the prisoners' and the prison's needs, the court upheld the constitutionality of the original rule, using a test of rationality. Obviously, the rule would have been invalidated had any higher standard of review been used.

Amici believe that these cases demonstrate that a simple rationality test is woefully inadequate to protect fundamental rights from unnecessary infringement. Applying a higher standard of review in this case is fully consistent with the court's relevant precedents. Heightened scrutiny should be used to review defendants' correspondence rule.

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CONCLUSION

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED.

Dated: Poughkeepsie, New York
September 8, 1986

Respectfully submitted,

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APPENDIX A

STATEMENTS OF INTEREST OF INDIVIDUAL ORGANIZATIONS *AMICI CURIAE*

Prisoners' Legal Services of New York, Inc. is a six-office, non-profit, public interest law firm which provides legal representation to indigent prisoners incarcerated in prisons throughout the State of New York. PLS advocates represent state inmates on civil matters, primarily relating to the conditions of their confinement.

Prison Families of New York (formerly the Prisoner Family Project) provides information, advocacy and support to families of prisoners in state, federal and local institutions in New York. The program is administered by prisoner family members and ex-offenders.

The Jerome N. Frank Legal Services Organization (LSO) is the clinical legal education program of the Yale Law School. LSO coordinates state legal assistance programs under faculty supervision for individuals who cannot obtain or afford quality legal services. Among the populations which are served are state and federal prisons throughout Connecticut. Since its founding in 1970, LSO's primary assistance projects have counseled almost 5,000 state and federal prisoners. LSO has participated as appellate counsel in cases before the First, Second, and District of Columbia Circuits as well as before the Supreme Court of the United States. LSO has also appeared as an *Amicus Curiae* in the Supreme Court of the United States and in several circuits.

Citizens United for Rehabilitation of Errants (CURE) is a national organization with the purpose of reducing crime through reform of the criminal justice system. Among CURE's goals are the enhancement of prisoner-family relationships and the enforcement of constitutional conditions of confinement.